



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, CNC, FFT

Introduction

This was a cross application hearing that dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the One Month Notice to End Tenancy for Cause (the "Notice")
- authorization to recover the filing fee for this application from the landlord

This hearing also dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for Cause, pursuant to sections 47 and 55

The tenant, the tenant's son (MA), the tenants' social workers (CN and LM), the landlord's agent and the landlord's resident manager attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. MA acted as agent and translator for the tenant.

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

Both parties agree that they were served with the other's application for dispute resolution. I find that each party's application for dispute resolution was sufficiently served for the purposes of this Act according to section 71 of the Act.

The tenant testified that no tenant evidence was served on the landlord.

The agent testified that the tenant was served with the landlord's evidence via registered mail at the end of July 2023. The agent entered into evidence a photograph

of a registered mail package bearing a tracking number. The Canada Post website states that the package bearing the above tracking number was mailed on July 27, 2023 and delivered on July 31, 2023.

The tenant testified that she received a package about the Notice and later testified that she did not receive the landlord's evidence.

Based on the photograph of the registered mailing and the Canada Post website, I find that the tenant received the landlord's evidence on July 31, 2023. I find that the landlord's evidence was sent to the tenant via registered mail on July 27, 2023 in accordance with section 88 of the *Act*. The landlord's evidence is accepted for consideration.

Preliminary Issue- Res Judicata

Res judicata prevents a plaintiff from pursuing a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment. It also precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action.

Both parties agree that they had a previous hearing regarding a previous One Month Notice to End Tenancy for Cause. The file numbers for the previous dispute are located on the cover page of this Decision.

The Details of Cause section of the Notice in this application states:

Ongoing tenancy issues of smoking in unit and an unauthorized animal present against the terms of tenancy. Unauthorized occupant residing in unit against terms of subsidy. Assault against the resident manager on March 28, 2023, at approx 9:45 am when she was in the unit to investigate a maintenance request and again found a cat in the unit. When she tried to take a photo for proof the tenant [name redacted] grabbed her roughly to forcibly remove the resident manager. Can no longer be considered a safe working environment for staff to enter.

MA testified that the landlord's claims in this application for dispute resolution and raised in the Notice, aside from the alleged assault, were all canvassed in the previous

application for dispute resolution. The agent testified that only the cat issue was addressed in the previous hearing.

The February 26, 2023 Decision states:

The One Month Notice provided in evidence states the reason of rendering the tenancy is that the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after being given written notice to do so. The landlord provided the written notice warning the tenant that pets were a violation of the tenancy agreement.

The tenant initially admitted to having cats, but removed them from the rental unit in February, 2022. The only further evidence provided by the landlord of the tenant having a cat after that time were the pictures taken November 7, 2022 showing a cat in the tenant's rental unit.

While the basis of issuing the One Month Notice was that the tenant had a pet in contravention of the tenancy agreement, the landlord has not provided evidence establishing that this term of the tenancy agreement is a material term as required by section 47 of the Act. The landlord stated in evidence that the tenant could have a pet if she filled out the paperwork allowing her to keep a pet as an emotional support animal. Therefore, I find that having a pet without filling out the paperwork stating that the pet is an emotional support animal is a technical, rather than a material breach of a term of the tenancy agreement. Therefore the landlord has not established the requisite cause to end the tenancy.

The tenant's application is granted. The One Month Notice is not valid and enforceable. The One Month Notice is cancelled. The landlord's application for an order of possession is dismissed.

Upon review of the February 26, 2023 Decision, I find that the landlord's claim that the tenant breached a material term of the tenancy agreement by having cats has already been determined and cannot be re-heard. I find that the claim is *res judicata*. I find that no other reasons to end tenancy were decided on in the February 26, 2023 and that the other claims made in the Notice have not yet been heard and can be determined in this dispute.

I note that only the reasons to end tenancy set out in the details of cause will be considered in this application for dispute resolution to ensure a fair hearing and that the tenant was properly informed of the claims against her.

Issues to be Decided

Is the landlord entitled to an Order of Possession?

Is the tenant entitled to the cancellation of the Notice?

Is the tenant entitled to recover the \$100.00 filing fee from the landlord?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts:

- This tenancy began on June 1, 2021 and is currently ongoing
- Rent geared to income in the amount of \$550.00 is payable on the first day of each month
- A security deposit of \$450.00 was paid by the tenant to the landlord

A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The agent testified that the tenant was served with the Notice via registered mail on April 21, 2023. Canada Post receipts stating same were entered into evidence. The tenant testified that she received the Notice on April 24, 2023. The tenant filed to dispute the Notice on May 1, 2023.

The Notice was entered into evidence, is signed by the agent, is dated April 21, 2023, gives the address of the rental unit, states that the effect date of the notice is May 31, 2023, is in the approved form, #RTB-33, and states the following grounds for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has:
 - significantly interfered with or unreasonably disturbed another occupant or the landlord;
- Breach of material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;

The Details of Cause section of the Notice states:

Ongoing tenancy issues of smoking in unit and an unauthorized animal present against the terms of tenancy. Unauthorized occupant residing in unit against terms of subsidy. Assault against the resident manager on March 28, 2023, at approx 9:45 am when she was in the unit to investigate a maintenance request and again found a cat in the unit. When she tried to take a photo for proof the tenant [name redacted] grabbed her roughly to forcibly remove the resident manager. Can no longer be considered a safe working environment for staff to enter.

The agent testified that the agent has moved into the subject rental property without the landlord's permission and contrary to the tenancy agreement and subsidy requirements. The agent testified that the tenant has moved out and no longer resides in the unit.

The agent testified that the landlord believes that the tenant no longer lives in the subject rental property because:

- During an inspection the tenant did not have a good answer as to where she was living
- The resident manager saw moving trucks at the end of December 2022 after which time the tenant's furniture was no longer in the subject rental property

The agent testified that the landlord believes MA is living at the subject rental property with his younger brother and sister because:

- The neighbours have complained about the brothers fighting at late hours
- MA's vehicle is always parked nearby.

The landlord entered into evidence:

- A statement from AG dated Aug 23, 2021 about loud arguing three nights in a row, mostly from a woman.
- A noise complaint warning letter from the landlord to the tenant dated August 23, 2021 about the August 23, 2021 complaint from AG

- A letter from AG dated March 11, 2023 which states that AG has been listening to two men fighting for over one hour and that this letter was written at 9 pm
- A letter dated May 11, 2023 from a neighbour which states that:
 - they have heard excessive and frequent fighting coming from the subject rental property and that two young adult men seem to be living in the unit
 - The mother and sons used to smoke in the bathroom but since the neighbours last complaint have moved to the patio causing the bedrooms to fill with smoke.

The agent testified that the frequent fighting between MA and his younger brother at late hours shows that he is living at the subject rental property.

Additional noise complaints were entered into evidence but have not been described as they are dated after the Notice was served on the tenant and thus could not have factored into the landlord's decision to serve the Notice. I must determine if the landlord had grounds to end the tenancy when the Notice was served.

MA testified that his family relies on him heavily and that he is at the subject rental property almost daily but does not live at the subject rental property. MA testified that his truck does not fit in his high rise parkade and so he leaves it parked on the street near the subject rental property. MA testified that he is in the trades and takes his little brother with him to work to get him experience in the trades.

MA testified that the tenant got rid of the furniture because she thought she was being evicted after the last eviction notice was served and does not have the financial resources for new furniture. The social workers testified that the tenant now has furniture. The social workers testified that the tenant sold her furniture because she has limited income. The social workers testified that the agent does not live with the tenant. The social workers testified that they attend at the subject rental property once per week and meet with the tenant and confirmed that the tenant resides at the subject rental property.

The agent testified that someone is smoking in the subject rental property. The agent testified that the above believe is based on the following:

- Complaints from neighbours about the smell of smoke coming from the subject rental property
- The presence of the smell of smoke inside the subject rental property during inspections

The landlord entered into evidence:

- A letter from AG stating that they wrote a letter in July 2022 about people in the subject rental property smoking in their bathroom and the smoke travelling to AG's unit. AG states that the indoor smoking has stopped but all residents continuously smoke outside their windows causing their home to fill with smoke.
- A warning letter from the landlord to the tenant dated August 2, 2022 regarding a complaint received against the tenant for smoking at the subject rental property which states:
 - Please be advised our office has received a complaint regarding smoking coming from your suite, and from your patio. The complainant has indicated the second-hand smoke is bothersome and is interfering with the quiet enjoyment of their suite.
 - As the tenant you are responsible for the actions of any person you invite onto or into the residential property. As such we are requesting that any person who is smoking at your suite move at least 5 meters away from the building this is to prevent second-hand smoke drifting into other tenants' windows.
 - As you are aware [the subject rental building] has been designated as a non-smoking building, in addition the Tenancy Agreement states: Section 17 - Conduct" ... In addition, noise or activity, including the production of second hand smoke, which in the reasonable opinion of the Landlord may disturb the comfort of any occupant of the residential property or other person, must not be made by the Tenant or the Tenant's guest's nor must any noise be repeated or persisted after a request to discontinue such noise of behaviour has been made by the Landlord."
- A warning letter from the landlord to the tenant dated September 12, 2022 regarding:
 - complaints received against the tenant for smoking in the subject rental property
 - MA residing at the subject rental property contrary to the tenancy agreement
- November 2022 inspection notes for the subject rental property which states "smoke"
- An email from the resident manager to the agent which states that on March 2, 2023 there was an overwhelming smell of cigarette smoke in the subject rental property.
- A letter to the tenant from the landlord dated March 7, 2023 which states:

- As well it had been noticed and recorded that during the annual inspection that was completed back in November 2022 your home smelled like tobacco smoke inside. On March 2, 2023 when the resident manager went to your unit to provide a garage remote it was again noticed that the unit smelled strongly of tobacco smoke. You are well aware of the sites smoking rules, have signed a no smoking agreement as part of your tenancy, and have received written warning and direction from landlord already in August 2022 to cease smoking in the property, or on its patio. This is not acceptable.

The tenancy agreement states:

9. **SMOKING.** Notwithstanding any other provision in this Agreement, and in addition to the obligations, rights and remedies set out herein:

Smoking is prohibited: in a Unit; on the interior common areas, including but not limited to in hallways, elevators, parking garages, electrical and mechanical rooms, stairs, storage locker areas; on patios and balconies; within six metres of a door, window or air intake; and within twenty-five meters of the playground area; and outdoor space designated as part of the Unit for the exclusive use of the tenant.

“Smoking” shall include the inhaling, exhaling, burning or ordinary use of any tobacco, cannabis or product whose use generates smoke.

The agent testified that his younger brother smokes but does not smoke inside the subject rental property. The social workers testified that they have not smelled smoke at the subject rental property.

The agent testified that on March 28, 2023 the tenant assaulted the resident manager. The resident manager testified that on March 28, 2023 she entered the subject rental property with the permission of the tenant to take pictures of the stove which required repair. The resident manager testified that after the photographs were taken she saw a litter box in the closet and a cat. The resident manager testified that she told the tenant that she was not permitted to have a cat and went to photograph the cat when the tenant forcefully grabbed her arm and tried to pry the phone out of her hand. The resident manger testified that the tenant only let go of her arm when she threatened to call the police. The resident manager testified that the tenant left bruises on her arm and

that she called the nonemergency police line after she left the suite and the tenant also called the police.

The resident manager testified that the police attended but since there were no witnesses and it was a “he said she said” situation, no charges were laid.

The landlord entered into evidence:

- an incident report from the resident manager dated March 28, 2023 which states in part:
 -I asked Mona if she still has a cat living in her unit after we had an arbitration regarding that matter less than a month ago. And at this very moment, the cat walked out of the dining room. I was trying to take a picture of the cat. Mona started yelling at me and violently grabbed my arm trying to rip off my phone out of my hands and break it. She was screaming at me: "Get out! Get out of my unit!" and pushing me out. I told her that I was going to call the police and she finally released my arm, so I left her house.
 - I immediately called [the agent] to report the incident and right after I called the police department.....
- a letter to the tenant dated April 4, 2023 which states “Due to ongoing breaches of tenancy around continued violations of the pet and smoking policies, further complaints received from neighbors on noise disruptions, and this unacceptable action of assault against our staff, we will be taking action to recover possession of our unit in accordance with the residential tenancy act.”

MA testified that the tenant is a Muslim woman who wears a hijab when outside her home but not inside her home. MA testified that when the resident manager came into the subject rental property on March 28, 2023 to take photos of the stove, the tenant was not wearing her hijab. MA testified that after photographing the stove the resident manager started taking photographs of the unit and his mother without her hijab on. MA testified that in his culture this is the biggest assault a person can do and that the tenant put up her hand to block the landlord from photographing her.

The social workers testified that they thought the landlord was discriminating against the tenant. The resident manager testified that she has 26 Middle Eastern tenants. The resident manager testified that she knows their culture and has always been respectful and never pointed her camera at the tenant.

Analysis

Based on the testimony of the tenant, I find that the tenant received the Notice on April 24, 2023. On review of the Notice, I find that it meets the form and content requirements of section 52 of the *Act*.

Section 47(1)(d)(i) states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property.

Based on the complaints entered into evidence by the landlord regarding smoking occurring in the subject rental property and or on the patio of the subject rental property, the November 2022 inspection report and the testimony and written reports of the smell of smoke in the property made by the resident manager, I find that the tenant or a person permitted on the subject rental property by the tenant regularly smokes inside and or on the patio of the subject rental property. I find that smoking inside the subject rental property breaches section 9 of the tenancy agreement.

I accept the social workers' testimony that they have not smelled smoke, but I find it unlikely that the tenant and or person permitted on the property by the tenant would smoke in their presence or immediately before their arrival. I find that the landlord's evidence proves, on a balance of probabilities, that the tenant or person permitted on the property by the tenant smokes in the rental unit and or patio.

I find that the repeated exposure to second hand smoke, which is well known to be a carcinogen, constitutes a significant and unreasonable disturbance to the tenant's neighbours. I find that it is unreasonable for the tenant's neighbours to be repeatedly exposed to second hand smoke. I find that the tenant has been given ample time to correct the disturbance and has not done so. I therefore uphold the Notice and dismiss the tenant's application to cancel it.

Section 55(1) of the *Act* states that if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if:

- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's

application or upholds the landlord's notice.

I find that since the Notice complies with section 52 of the *Act* and the tenant's application to cancel the Notice was dismissed, the landlord is entitled to an Order of Possession effective August 31, 20223.

As I have determined that the landlord is entitled to an order of possession based on the tenant or person permitted on the property by the tenant smoking in the subject rental property and or patio, I decline to consider the other reasons to end the tenancy provided in this dispute.

As the tenant was not successful in this application for dispute resolution the tenant is not entitled to recover the \$100.00 filing fee from the landlord.

Conclusion

The tenant's application for dispute resolution is dismissed without leave to reapply.

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective at **1:00 p.m. on August 31, 2023**, which should be served on the tenant. Should the tenant and all other occupants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: August 22, 2023

Residential Tenancy Branch